

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

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PEOPLE OF THE STATE OF NEW YORK,

DECISION & ORDER

-against-

Indictment #39/1996

ANDREW KRIVAK,

Defendant.

-----X
HON. VICTOR J. ALFIERI, JR., A.J.S.C.

The Defendant, Andrew Krivak, moves this court pursuant to Criminal Procedure Law §440.10(1)(g) to vacate the his 1997 conviction for Rape and Murder, based upon the discovery of new evidence. Affidavit of Bernhard, page 16 (hereinafter "Bernhard page 16" and Bernhard and Sipos, Defendant's Memorandum of Law in Support of Motion to Vacate Conviction and Sentence and for DNA Testing (hereinafter "Memo in Support"). As the People have consented to DNA testing, that issue is moot and future DNA testing, will not be addressed in this Decision.

In deciding this motion the court has relied upon the following submissions of counsel:

- (I) Defendant's Motion to Vacate and Exhibits;
- (ii) Defendant's Memorandum of Law in Support;
- (iii) Affidavit in Support;
- (iv) Defendant's Supplemental Affidavit;

- (v) People's Affirmation and Memorandum;
- (vi) Defendant's Reply to People's Affirmation;
- (vii) Hearing Trial Transcripts and Exhibits filed by both sides;
- (viii) Defendant's Reply;
- (ix) People's Sur-Reply letter;

The Defendant was convicted by a jury after trial of Murder in the Second Degree and Rape in the First Degree of a twelve year old victim, JW. The Defendant's conviction was affirmed by the Appellate Division on October 4, 1999. People v. Krivak, at 265 AD2d 343 (App Div 2nd Dept (1999)), Appeal Denied, 94 N.Y.2d 864. The crux of the Defendant's appeal was the denial by the trial court (Bratz, J.) of the Defendant's motion to suppress his confession to police and that the verdict was against the weight of the evidence (id, at 344). The Appellate Division held that the statement was voluntarily made and Defendant, a "competent adult" had "waived his right to counsel on three separate occasions." Id. The court also addressed an issue the Defendant raises in his instant motion that several people had reported seeing the victim, JW after her October 3, 1994 murder. The

Appellate Division held,

defendant also claims that the verdict was against the weight of the evidence because the jury failed to duly credit the witnesses who allegedly saw the victim alive after the date that he killed the victim. We disagree. Resolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the trier of fact (see, *People v. Gaimari*, 176 NY 84, 94). Upon the exercise of our factual review power, we are satisfied that the verdict of guilt was not against the weight of the evidence (see, CPL 470.15 [5]).

Krivak, at 265 AD2d 344. The Defendant alleges as support for his motion for a new trial the following major grounds summarized as follows:

- (A) Had the proffered culpability of Howard Gombert who made a 'jail house' confession to fellow prisoner Santoro, as new evidence, been received at trial the "jury would have voted to acquit";
- (B) New evidence that the police coerced and pressured witnesses to make incriminatory statements would cause a reasonable jury to acquit;
- (C) DNA testing of crime scene evidence failed to connect Defendant to the crime scene, and therefore, "corroborates" Defendant's claim of innocence;
- (D) Due Process, Equity and the Interests of Justice Compel a

New Trial;

(E) A recent civil verdict against a polygraphist Daniel Stephens who conducted a "post confession interview" of Defendant (Hearing Tr. At 416), that he had obtained a false murder confession in an unrelated 1990 case, such evidence offered at trial would produce a more favorable result for Defendant.

(F) The People committed a violation of Brady vs. Maryland (373 U.S. 83) by failing to give the defense evidence in their possession that was exculpatory.

The general proposition for obtaining a new trial based upon newly discovered evidence is set forth in People v. Salemi, (309 NY 208 (1955)) cited by Defendant is that the new evidence must be sufficient as to "probably change the result" if a new trial was granted; and, it must have been "newly discovered" specifically "it is not such as could have not been discovered before trial by the exercise of due diligence", and must be non-cumulative. Salemi at 226. The evidence must also be reliable. People v. Pierre, 129 A.D. 3d 1490, 4th Dept. 2007. The evidence must be supported by independent competent trustworthy proof. People v. Settles, 46 N.Y. 2d 154 (1978).

The Defendant cites the case of his fellow Defendant, Andrew DiPippo, who received and was acquitted at his re-trial which was granted by the Court of Appeals, primarily based upon the discovery of the "jailhouse" confession by Howard Gombert to a fellow prisoner wherein Gombert admitted having committed the murder of a woman in Putnam County for which 'two suckers' were convicted. Presumably JW¹ was the victim. People v. DiPippo, 27 NY3d 127, (2016). The Court of Appeals found the evidence of "Defendant's third-party culpability proffer was compelling and highly probative". Id.

In the Krivak trial, the jury had much more probative evidence to consider than the DiPippo motion and trial evidence. Primarily, Krivak made a detailed voluntarily confession, which was tested by a pre-trial Huntley hearing and submitted to the jury with a jury charge that it, the jury, must conclude the confession was voluntary beyond a reasonable doubt. Exhibit 2 attached to People's Memorandum (hereinafter "People's Memo Ex 2"), and Trial Transcript at pages 1318 to 1326 Judge's Charge to the Jury, (Hereinafter "TT at 1318 to 1326"); Exhibits 3 "A" to

¹Although he never referred to her by name, he described relevant circumstances.

"C" inclusive, and Trial Exhibits 4 "A" to "I" inclusive

(Hereinafter "TR Ex. 3A to C Inclusive", for e.g.

Unlike DiPippo who made incriminating admissions to three people, Krivak made a confession, fully acknowledging his guilt in the rape of JW while denying the murder.

"As a general rule, voluntary confessions constitute the highest and most satisfactory species of evidence". *Prince, Richardson on Evidence* (11th.Ed, Farrell) Section 267 at page 592. So probative is a detailed voluntary confession considered, that the Court of Appeals has held a violation of the Defendant's right to counsel was deemed to be harmless error in light of Defendant's voluntary confession, in affirming the Defendant's murder conviction. *People v. Shaeffer*, 56 NY2d 448 at 454-455 (1981). In the case at bar, the alleged "new evidence" pales in comparison to the Defendant's confession.

Examining the Defendant's confession, one finds many correlations with other established facts and evidence, which verify many of Defendant's admissions in his confession. Each item in Krivak's confession are dealt with below along with the independent verification evidence:

(a.) Brown Van. The Defendant stated that he drove his father's brown Ford Van on October 3, 1994 when he and others picked up Denise Rose and JW on "the night JW died". Page 1 Defendant's Confession. This fact is verified by, among other witnesses, Gary Kemptor who saw the Defendant at the Citgo Station in a brown van, on October 3, 1994. Defendant's Trial Transcript, page 102 (hereinafter "TT p. 102"). JW was present with Defendant. TT at 103-4. Kemptor identified at trial the van driven by Krivak. TT at 105-6.

When Kemptor left the Citgo Station on October 3, 1994 at 8:20 p.m., Krivak and JW left the Citgo in the van together with other people. TT p 107. On May 11, 1995 a search of the van disclosed 2 rings. TT at 335. Both rings were identified as JW's's by two friends, Tara Duffy and Victoria Gay. TT 400-1, and TT 428, respectively. One of the rings was a present to JW from Ms. Duffy. Id. at 401. (On May 11, 1995 the Defendant was stopped by Officer Joseph Spinelli and the van was seized and impounded. TT at 421. The van was secured at Bill's Autobody. TT at 421-423.) The rings belonging to JW were later found in the van.

(b.) Denise Rose was in the van on the night of JW's's murder.

Page 1 Confession. Kemptor testified that Rose was among the group at the Citgo. TT p. 107. Rose testified that the van driven by Defendant "pulled up outside my house". TT p. 139.

She identified a photo of the van in court. TT p. 140.

Confirming the Defendant's confession, Rose observed JW inside the van. TT at 141-2. Both the Defendant and Rose agree that JW and Rose were seated on the floor in the back of the van.

Confession, Page 1; TT at 142².

(c.) Fields Lane. Defendant stated in his confession he drove to Fields Lane and parked. Confession Page 3. The parking of the van on Fields Lane was confirmed by testimony of William MacGregor who with Kemptor's testimony (above), also verifies that portion of Defendant's confession that JW and Defendant were in the van with Wilson, Rose, DePippo and MacGregor parked on Fields Lane. TT at 358-9, and 383. JW's's body was found off of Fields Lane. TT 509 to 517, *supra*.

(d.) Victim's Clothing. Defendant confessed he pushed JW to the floor of the van and removed her pants. He removed JW's panties

²Rose was examined by Defendant's attorney extensively at trial about the veracity of her statement. TT 138-300.

which he then "shoved in her mouth" to stop her from screaming.

Confession at Page 4. Krivak then confessed he tied JW's's hands with rope he found in the van. Confession at Page 4.

The Defendant confessed he removed JW's's bra and shirt and tied her hands, then tied the bra "around JW's's mouth to keep her panties in her mouth to keep her from screaming". Page 4.

Krivak also stated, as noted above, "I pushed JW to the floor of the van & took her pants and panties off... and "put my penis into her vagina". Page 4. The evidence at the scene of the discovery of JW's's decomposed body indicated that her body was not clothed at the time the body was left in the woods and discovered more than a year later, is also consistent with Krivak's confession that she was stripped of her clothing.

Confession pages 4&7; TT at 518 to 531; TT 727 to 730

(McDonough); Exhibits 48, 51 & 61, indicating remains consisted of bones "covered" by a jacket as described in Krivak's confession that JW was "wrapped" in her jacket, [after then raping JW, JW was removed from the van and "wrapped with her shirt and jacket"]. Page 5 Confession. JW's's body was then carried into the woods. Id. p. 5-6. Krivak then drove the van from the scene

to the passenger's houses and dropped them off. Id. p. 6.

(d.) Discovery Of Body & Clothing & Other Evidence at Fields

Lane. On November 22, 1995 Kevin Curry, was hunting on Fields Lane off of Fair Street. TT at 436. Curry was following a Deer Run when he "kicked something" later recognized to be a "human skull". TT at 430. Curry contacted the police and brought them to the place where he found the skull. TT at 442. The remains were found approximately 400 feet off of Fields Lane (3/10 mile from Fair Street). TT Rees at 512. Detective Rees also found the following items with or near JW's skeletal remains, all of which verify aspects of Defendant's confession:

- i. Two sneakers. TT at 513 and Exhibit 17 later identified as two sneakers belonging to JW by her mother. TT at 821-822;
- ii. "Lower jaw bone, hair and knotted bra" found with bones of JW. TT at 515-516. The Body of JW was identified to be that of JW by use of dental records. TT Levine at 690-694, Exhibits 53, 54;
- iii. "Mass of hair, a hair band, the jaw itself and a bra". TT at 516 and 729; Exhibits 33 & 48;
- iv. Bones within a pile of brush with "small limbs". TT at

516, and 727;

v. Defendant confessed that a jacket was wrapped over JW.

Confession page 5. At the scene of JW's remains, Police discovered Greenish-brown jacket which "appeared to be placed over the top of the remains covering a majority of the bones that we found". TT at 519³; Exhibit 18. Dr. McDonough testified the bones were of one individual. TR 732. The condition of the remains were consistent with death occurring on October 3, 1994. TT at 754-756.

vi. "Pair of underpants... at the top of the spinal column... scrunched together in a small ball or ballshape" which constitutes evidence of, and confirms Defendant's confession as to his placing the panties in JW's mouth. TT at 523-524; Exhibit 20

vii. "A shirt". TT at 526; Exhibit 22. As the Defendant confessed, a shirt was placed on JW and the jacket was wrapped around her. Confession page 5.

viii. "small glass pendant" containing a "hologram of an eye"

³None of the bones were in the jacket, which is consistent with the Defendant's depiction of the victim being dropped with the jacket covering her". Page 5.

TT at 528; Exhibit 23⁴.

ix. Rope wrapped around JW's bones was also found. TT582-3, and TT 730 "Rope wrapped around leg bones"-DR. McDonough.

The Defendant argues his confession was forced upon him, and Denise Rose's statement extorted from her by police. However, the physical evidence found at the scene of her remains verifies the Defendant's confession as to time, places, evidence and manner of death by virtue of the discovered items of evidence of clothing, condition of the body, the rope around the bones, the panties at top of the spine all of which were found in, on, or near JW's's remains along with jewelry found on her remains removed and hidden in the Defendant's van.

In the case at bar, Krivak gave a detailed confession to the police (Stephens, Quick and Castaldo), as to his involvement in the rape and murder. According to the trial testimony in the Defendant's trial, the rape and murder occurred in Krivak's van. Denise Rose, the only eye witness to step forward, verified Defendant's account as she testified that the murder and rape

⁴ Defendant confesses (on Page 7) that the jewelry was removed from JW and "hidden in the van".

took place in Krivak's van.

As noted above, the confession made by Krivak survived the test of the Huntley Hearing, where its voluntariness was proven to the satisfaction of the Judge beyond a reasonable doubt. Then at pages 1318-1326, the court gave the appropriate instructions to the jury concerning their obligation to find the statement was voluntary and truthful beyond a reasonable doubt. (P 1319). The Judge defined the term "voluntary" and advised the jury they must find that the "statement" was "knowingly, freely, and willingly given by the Defendant". (Tr. P. 1320). The Judge instructed the jury on the Defendant's Miranda rights, (§60.45 Criminal Procedure Law), and gave instructions to the jury they must disregard the confession if they find the police used deception to obtain it by tricks or false promises likely to induce an otherwise "unwilling statement". (p. 1321).

As to the Defendant's confession, the court ruled, after the Huntley hearing that Krivak's confession consisting of nine pages including questions and answers, was not the product of "any unreasonable denial of any of the rights of the Defendant".
Hearing Decision at page 10.

The Defendant's nine page confession is detailed and indicates even greater culpability of Krivak than that of DiPippo, whom the Defendant states performed penetration of the victim while Krivak raped and caused JW's's death by tying JW's's hands with rope, then placing and securing the panties in her mouth with JW's's bra to stop her screams, thereby causing her to suffocate. See, page 4 of Defendant's confession and McDonough TT 737 to 741. After performing the rape of JW the Defendant and DiPippo removed her lifeless body and DiPippo carried the body towards the woods. (Confession pages 5-6). JW's body was discovered 400 feet off of Fields Lane. TT 512. All of which confirms and verifies the reliability of defendant's confession.

Brady Violation. The defendant argues that the People failed to give exculpatory evidence to the defense. The evidence consists of there memorandums (attached to Defendants Memorandum In Support, Exhibit 19). The defendant also attaches a letter from assistant District Attorney David M. Bishop written to Dipippo's attorneys referring to the three memos all of which indicates that the Carmel police were interested in whether there was a connection between a missing persons case within their

jurisdiction and the murder of JW. The Carmel police apparently visited the place on Fields Lane where the remains of JW were found. As stated in the Bishop letter this 'tip' as he referred to it, was a result of a news article printed 'in a local newspaper' in 1995. The memos are dated 11/27/95, 11/28/95 and 11/29/95 clearly indicating that this information was made public in the local paper before the defendant's trial and, with due diligence could have been pursued by the defense prior to, or at the defendant's 1997 trial. As such it does not constitute new evidence. The defendant must exercise due diligence in pursuing 'new evidence' for use at trial. People v. Boyette, 201 A.D.2d 490, Leave To Appeal denied 74 N.Y.2d 805; See also Salemi, *supra*; and Settles, *supra*.

Coercion by Police. The Defendant also claims as new evidence, that Investigator Stephens of the Putnam County Sheriff's Department, coerced Defendant into giving a false confession and had done so in "an earlier murder case". Clearly, if true, this information would not constitute newly discovered evidence. The examination of Stephens covered this area and was presented at Krivak's trial. This purported new evidence would be cumulative

as clearly the Defendant made such allegations at the time of the Defendant's trial during cross examination (TT 1018 to 1047), and argued to the jury in the Defendant's summation (TT 1254 to 1256).

DNA TEST RESULTS The Defendant claims as new evidence warranting a re-trial that DNA testing already performed excludes the Defendant as the rapist and murderer as "none of the material collected from the crime scene linked the Defendant to the murder". Page 19 to 24 §B Defendant's Memorandum in Support and Exhibits 20 and 21 attached. The Defendant's argument here in unpersuasive. The Defendant states that "none of the material collected from the crime scene linked the Defendant".id.

However, the van did not become a "crime scene" until one year after the murder and the place where JW's's decomposed body was discovered was out of doors in a wooded area subject to degrading and decomposition by the elements, bacteria and animals for more than one year. The bra with the hair intertwined could not "exclude the victim" whose hair one would expect to be present in the bra, or on the rope which was tied around the victim, both of which were subject to the weather over the year it remained in

the wooded area'. possibly degrading the sample.

DNA evidence may degrade by the passage of time. See for e.g., Davis v. McCoy, 1998 U.S. Dist. Lexis 5696. Evidence over time, especially out in the elements, may also degrade or not present at all. Evidence may also disappear as a result of being consumed by bacteria, which expert testimony in the DiPippo retrial established were present and had consumed JW's's tissue in this case as the body decomposed. See DiPippo Trial Transcript at page 889 (9/21/16); See also for e.g., People v. Castro, 144 Misc2d 956 at 975 (Sup Ct, Bronx Co. 1989); People v. Shi Fu Huang, 145 Misc2d 513. See also: Rizzi, et.al., Ancient DNA Studies: New Perspectives On Old Samples, Genetics Selection Evolution, at GSE.BiomedCentral.com.

In sum, this point of the Defendant's motion is unpersuasive. It is equally likely that the lack of DNA was due to the presence of bacteria and the lapse of 14 months' (October 3, 1994 to November 22, 1995) during which time decomposition of JW's body occurred. The body was also subject to weather conditions over that time, affecting the sample sources making it unlikely a reliable sample could be obtained. The Defendant fails

to account for these factors in his motion, and thus fails to establish that evidence consisting of the lack of DNA evidence would likely produce a different verdict. The argument advanced by the Defendant, is not that DNA excluded the Defendant but that the absence of DNA has excluded the defendant. To accept this argument as new and exculpatory evidence, one must conclude that if the defendant murdered JW it would have been likely that his DNA would have been found on the bra where the tested hair was found. TT 585-6. It is mere speculation that a positive sample of defendant's DNA should have been found had he been the killer.

Conclusion. In the case at bar, the defendant's confession withstands the test enunciated by the Court of Appeals as to reliability of confessions. As Stated in People vs. Dipippo, *supra*, the reliability of a freely given, detailed confession against the interest of the declarant, warrants the overwhelming conclusion that a new trial is not likely to produce a different result. A *Fortiori*, the rule enunciated by the Court of Appeals warrants application to this case, the defendant's confession is reliable as verified by a multitude of evidence. As the Court stated,

[if] the declarant is unavailable as a witness at trial; [and] the declarant was aware the statement was against his or her penal interest when it was made; [and] the declarant had competent knowledge of the facts underlying the statement; and "supporting circumstances independent of the statement itself . . . attest to its trustworthiness and reliability" . . . to circumvent fabrication and insure the reliability of . . . statements [against penal interests] . . . there must be some evidence, independent of the declaration itself, which fairly tends to support the facts asserted therein...

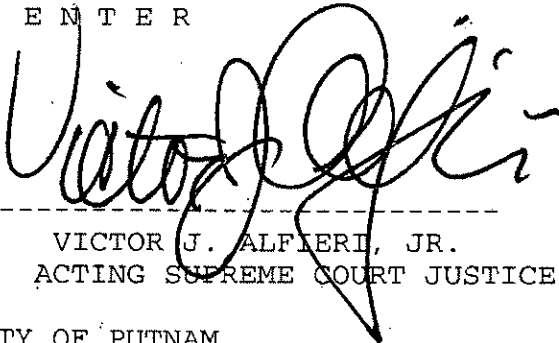
People V. Dipippo, 27 N.Y.2d 127 at 137 (Citations omitted).

In the independent evidence gathering process in this case, and by the testimony of the witnesses referred to hereinabove, the Defendant's detailed confession, is affirmed by "evidence independent of the [statement] itself" and, as such outweighs the sum of the allegations advanced by defendant warranting a new trial. Dipippo, supra.

Given the overwhelming evidence of the Defendant's guilt, the purported "new evidence", is not likely to result in a more favorable verdict for Defendant. People v. Rivera, 108 AD2d 829 (2nd Dept 1985). The Defendant's motion is denied.

This decision shall constitute the order of this Court.

E N T E R



Dated: December 19, 2016
Carmel, New York

VICTOR J. ALFIERI, JR.
ACTING SUPREME COURT JUSTICE

TO: DISTRICT ATTORNEY, COUNTY OF PUTNAM
ATT. LARRY GLASSER
ADELE BERNHARD, ESQ.